United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B

75-6051

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

REV. DONALD L. JACKSON,

Appellant,

v.

UNITED STATES OF AMERICA
and STATE OF NEW YORK,

Appellees.

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

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BRIEF FOR APPELLEE, UNITED STATES OF AMERICA.

Preliminary Statement.

The lawsuit which gives rise to the appeal now before this court was filed by the appellant in the United States District Court for the District of Columbia in March, 1974, but subsequently transferred by that court to the United States District Court for the Western District of New York, pursuant to Title 28, United States Code, Section 1404(a).[1] According to paragraph 3 of his complaint, the action "concerns the Right to Vote and Hold Office, equal employment opportunity, equal protection of laws, freedom from discrimination in the distribution of public moneys and quasi-public moneys, the right to vote and to hold a position in the Judicial Branch of Government, the right to collect wages

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[1] Rev. Jackson improperly and unsuccessfully attempted to appeal United States District Judge Aubrey Robinson's order directing the change of venue.

earned, and various other issues related thereto". In both his prayer for relief and a motion filed on July 30, 1974 Jackson requested the convening of a three-judge court to hear and determine his claims that certain New York State constitutional and statutory provisions deprived him of his right to vote and hold judicial office.

Jackson apparently alleges that the provisions of Article 6, Section 20 of the New York State Constitution, limiting certain judicial offices to individuals admitted to practice law in that state, violate various federal constitutional and statutory rights claimed by him.[2] He also claims that Section 137 of the New York Election Law violates his right to equal protection of the laws since it requires a candidate seeking political party nomination in a primary election to be an enrolled member of that party, but does not apply to candidates for judicial office.[3]

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[2] Article 6, Section 20, of the New York Constitution provides in pertinent part as follows:

> a. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the court of appeals, justice of the supreme court, or judge of the court of claims unless he has been admitted to practice law in this state for at least ten years. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the county court, surrogate's court, family court, a court for the city of New York established pursuant to section 15 of this article, district court or city court outside the city of New York unless he has been admitted to practice law in this state at least five years or such greater number of years as the legislature may determine.

[3] New York Election Law, Section 137, reads in pertinent part as follows:

> 1. No petition for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid unless the person so designated shall be enrolled as a member of the party referred to in said designating petition at the time of the filing of the petition . . .
>
> 5. This section shall not be construed to apply to a political party designating or nominating candidates for the first time, nor to candidates for judicial offices.

Decision of the District Court.

In an opinion filed on March 28, 1975, the Honorable John T. Curtin denied appellant's motions for the convening of a three-judge court and his request for preliminary injunctive relief. The District Court held that appellant's challenge to Article 6, Section 20 of the New York State Constitution, was insubstantial since "professional qualifications for a judicial position are not an invidious requirement". The court also found that Jackson's constitutional claim regarding Section 137 was also insubstantial. Jackson appeals from this order.[4]

Question Presented.

Did the District Court properly deny appellant's request for the convening of a three-judge court?[5]

ARGUMENT.

POINT

The District Court properly denied appellant's request for the convening of a three-judge court.

In seeking an injunction against the operation and enforcement of New York State's constitutional and statutory

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[4] In his brief Jackson also seeks review by this Court of a number of other matters, none of which involve appealable orders of the District Court, Rule 4, Federal Rules of Appellate Procedure.

[5] Jackson has seen fit to name the United States as a party defendant in this case even though he makes no claim regarding the constitutionality of any federal statutes. Although a determination of Jackson's claims by a three-judge court would not appear to affect any interests of the federal defendant, the United States opposes the convening of a three-judge court since it would be "a patently wasteful formality" *Nieves v. Oswald*, 477 F2d 1109, 1115 (2nd Cir., 1973).

provisions, appellant claims that Title 28, United States Code, Section 2281 require the convening of a three-judge court to hear and determine the issues raised in his complaint. Section 2281 provides that

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

The purpose of Section 2281 is to provide "procedural protection against an improvident doom by a federal court of a state's legislature policy" *Phillips v. United States*, 312 U.S. 246, 251 (1941). Additionally, "the purpose of the three judge scheme was in major part to expedite important litigation". *Swift and Company v. Wickham*, 382 U.S. 111, 124 (1965). However, "three-judge court statutes are technical enactments, to be restrictively construed". *Nieves v. Oswald*, 477 F.2d 1109, 1115, (2nd Cir., 1973) or "strictly construed" *Board of Regents v. New Left Education Project*, 404 U.S. 541, 545, (1972).

It is now well settled that a single judge may properly refuse to convene a three-judge court where no substantial constitutional question is raised. *Rosenthal v. Board of Education*, 497 F2d 726, 729 fn 11 (2nd. Cir., 1974). "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy' " *Ex parte Poresky*, 290 U.S. 30, 32 (1933), quoting from *Levering and Garrigues Co. v. Morrin*, 289 U.S. 103, 105

(1933) and *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910). The test to be applied to such constitutional claims is essentially two-pronged, see *Hagans v. Lavine*, 415 U.S. 528, 563-564 (1974) (Rehnquist, J., dissenting), and requires dismissal where the claim is either "obviously without merit" or foreclosed by earlier court decisions *Goosby v. Osser*, 409 U.S. 512, 518 (1973).

The Supreme Court has consistently upheld the authority of the various states to regulate admission to the practice of law within the state *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971); *Konigsberg v. State Bar*, 366 U.S. 36 (1961). Most recently, the Court said "it is indisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses 'the character and general fitness requisite for an attorney and counselor-at-law' " *In Re Griffiths*, 413 U.S. 717, 723 (1973), quoting from *Law Students Research Council v. Wadmond*, *supra*, at 159. While a state may not establish admission requirements which contravene the Fourteenth Amendment's right of due process or equal protection, *Dent v. West Virginia*, 129 U.S. 114 (1889), "a State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law" *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

Where previous court decisions have firmly established the authority of the States to maintain educational and fitness standards for admission to practice law, and where other decisions make clear that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies, *Bullock v. Carter*, 405 U.S. 134, 145 (1972), the legitimate state interest in assuring that judicial offices are filled by qualified and experienced persons is "very plain", *Hart v. Keith Exchange*, 262 U.S. 271,

274 (1923), and "so patently rational as not to require meaningful consideration". *Hagans v. Lavine*, 415 U.S. 528, 541 (1974). Since, the reasonableness of Article 6, Section 20 is so readily apparent, Jackson's claim is "obviously without merit". As this court has recently stated in another case challenging a section of Article 6 of the New York Constitution, the issue of restrictions regarding eligibility to hold judicial office "is properly one for the legislative or electoral processees of the State of New York and . . . the effort to clothe it in constitutional garb is frivolous" *Rubino v. Ghezzi*, 512 F2d 431, 433 (2nd Cir., 1975).

If it is determined that there is no merit to appellant's contention that Article 6, Section 20 of the New York Constitution violates his right to equal protection of the laws, his constitutional attack on Section 137 of the New York Election Law must necessarily fail since it is premised upon a nonexistent right to run for judicial office. See *Peterson v. Knutson*, 367 F.Supp. 515 (D.C. Minn. 1973). Even if there were some merit, however dubious, in appellant's initial claim with respect to Article 6, Section 20, when scrutinizing the restrictions contained in Section 137 of the New York Election Law "it is essential to examine in a realistic light the extent and nature of their impact on voters" *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

As Judge Curtin has indicated in his decision and opinion below, appellant is not precluded by the provisions of Section 137 from seeking judicial office in New York State. In fact, by specifically exempting judicial candidates from its terms, the statute would apparently allow appellant to file designating petitions in any party primary election of his choice since party membership is not required for judicial candidates. Under these circumstances, appellant's claim that Section 137 deprives him of equal protection of the laws is "completed devoid of merit" *Hagans v. Lavine*, 415 U.S. 528, 543 (1974), quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974).

Conclusion.

For the reasons stated above, it is respectfully submitted that the decision of the District Court should be affirmed in all respects.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Rev. Donald L. Jackson
v
U. S. A. and State of New York
Docket No. 75-6051

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 26 day of September, 1975 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

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Rev. Donald L. Jackson
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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Theodore J. Burns, Asst. U. S. Attorney
502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
26 day of September, 19 75

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77